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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

J.R. et al., Plaintiffs and Respondents, v. M.H., Defendant and Appellant.	A146290 (Humboldt County Super. Ct. No. PR040366)

Defendant M.H. (Mother) appeals from the order terminating her parental rights to her children J.P. (14 years old) and J.H (16 years old) in order to free them for adoption by plaintiffs J.R. and J.R., the children's long-term guardians. She asserts the trial court committed reversible error when it failed to consider whether to appoint counsel for the children and when it failed to follow the requirements of Family Code sections 7850 and 7891.[1] We agree that some of the asserted errors occurred, but conclude they were harmless. Accordingly, we will affirm.

FACTUAL BACKGROUND AND PROCEDURAL HISTORY

On November 10, 2004, plaintiffs filed a petition to be appointed as the children's guardians. At the time, the then current guardian was seeking to terminate her guardianship of the children and had consented to plaintiffs becoming their guardians. Mother was incarcerated during this period, and the children's father, S.P., was homeless and had been diagnosed with lymphoma. Plaintiffs had been family friends of Mother

[1] Unless otherwise indicated, all further section references are to the Family Code.

and S.P. since meeting Mother in church in 2001. Plaintiffs had been appointed as the children's temporary foster parents in October 2002 in connection with a dependency proceeding that was dismissed after 10 days, with the children being returned to Mother. Plaintiffs have six children of their own, who in November 2004 ranged in age from one to 13 years old. They lived in a large four-bedroom house located near J.P.'s and J.H.'s paternal grandparents. Mother's children had stayed in and visited plaintiffs' home and were friends with plaintiffs' children. Mother formally consented to plaintiffs' guardianship.

On February 18, 2005, the trial court granted plaintiffs' guardianship petition. The court reviewed and continued the guardianship on an annual basis up to and including the time of the events at issue in this appeal.

On February 20, 2015, plaintiffs filed a petition to have J.P. and J.H. declared free from parental custody and control. Plaintiffs sought to adopt the two children, apparently in an effort to obtain funds through adoption assistance to place J.H. in a group home that could provide her with much-needed mental health treatment. Reportedly, S.P. had previously completed a designated relinquishment of his rights. Mother had not visited her children in over four years. A hearing on the petition was set for March 24, 2015.

On March 24, 2015, Mother appeared in court and was appointed counsel. The matter was continued.

On April 29, 2015, the Humboldt County Probation Department (Department) prepared an investigative report regarding the children's circumstances.

On June 23, 2015, the trial court granted plaintiffs' petition. Mother was not present at the hearing and her counsel noted an unspecified objection for the record on her behalf. Mother's and S.P.'s parental rights were terminated. Plaintiffs were appointed as the children's guardians under section 7893 and Probate Code section 1516.5, and the matter was referred for a home study evaluation. Mother's attorney relayed her request for an open adoption. This appeal followed.

DISCUSSION

I. Legal Background

"Statutes authorizing an action to free a child from parental custody and control are intended foremost to protect the child. [Citation.] Typically, such statutes are invoked for the purpose of terminating the rights of one or more biological parent, so the child may be adopted into a stable home environment. [Citations.] In any event, the best interests of the child are paramount in interpreting and implementing the statutory scheme. [Citation.] Indeed, our Legislature has declared that the statutory scheme 'shall be liberally construed to serve and protect the interests and welfare of the child.' " (*Neumann v. Melgar* (2004) 121 Cal.App.4th 152, 162 (*Neumann*).)

"A proceeding may be brought under [§ 7800 et seq.] for the purpose of having a child under the age of 18 years declared free from the custody and control of either or both parents if the child comes within any of the descriptions set out in this chapter." (§ 7820.) "An interested person may file a petition under this part for an order or judgment declaring a child free from the custody and control of either or both parents." (§ 7841, subd. (a); see § 7841, subd. (b) ["interested person" includes "a person who has filed, or who intends to file within a period of 6 months, an adoption petition . . . ."].) "A declaration of freedom from parental custody and control . . . terminates all parental rights and responsibilities with regard to the child." (§ 7803.)

II. The Trial Court Should Have Considered Appointing Counsel for Minors

Mother challenges the judgment on grounds not raised below.[2] She first argues the trial court's failure to appoint counsel for her children compels reversal of the

[2] We need not reach the issue of forfeiture with respect to this issue because, as we discuss *post*, we find no miscarriage of justice from the trial court's error. We note, however, that Mother does have standing to raise the issue of the trial court's failure to consider appointment of independent counsel for the children, because independent representation of a child's interests may impact a parent's interest in the parent-child relationship. (*In re Noreen G.* (2010) 181 Cal.App.4th 1359, 1377–1378.) In addition, because the procedural protections afforded by section 7861 and other provisions of the same article "are all calculated to promote the best interests of the affected children,"

judgment declaring them free from her custody and control. In her view, because there was no evidence that there was no need for appointed counsel, the court's failure to consider whether to appoint counsel is reversible per se. Although we agree with Mother that the court's failure to consider appointing separate counsel for the children was error, we find the error harmless.

At the beginning of a proceeding on a petition to free a child from parental custody and control, section 7860 provides that "counsel shall be appointed as provided in this article." Under section 7861, "[t]he court *shall consider* whether the interests of the child require the appointment of counsel. If the court finds that the interests of the child require representation by counsel, the court shall appoint counsel to represent the child, whether or not the child is able to afford counsel." (Italics added.) Construing the statutory predecessor to section 7861, the California Supreme Court held that "in absence of a showing on the issue of the need for independent counsel for a minor, failure to appoint constitutes error." (*In re Richard E.* (1978) 21 Cal.3d 349, 354 (*Richard E.*).) Nevertheless, "failure to appoint counsel for a minor in a freedom from parental custody and control proceeding *does not require reversal of the judgment in the absence of miscarriage of justice*." (*Id.* at p. 355, italics added.) This miscarriage of justice test permits reversal only if it is reasonably probable the result would have been different but for the error. (*In re Celine R.* (2003) 31 Cal.4th 45, 60.)

As appellate courts have explained, "in proceedings to free a child from parental custody and control, typically each side asserts it is protecting the best interests of the child and, in the process, the court becomes fully advised of matters affecting the child's best interests." (*Neumann, supra*, 121 Cal.App.4th at p. 170.) Nevertheless, "section 7861 makes clear that the court has a *non*discretionary duty to at least *consider* the appointment" of counsel for the child. (*Id.* at p. 171.) Thus, while the ultimate decision whether to appoint counsel is a matter within the trial court's discretion, where there has

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appellate courts have held that the issue of a trial court's failure to consider appointment of independent counsel may be raised for the first time on appeal. (*Neumann, supra,* 121 Cal.App.4th at p. 164.)

been no showing on the issue of whether the child's interests will be satisfactorily represented, "the court's failure to appoint counsel is deemed *erroneous*." (*Ibid*.) There is nothing in the record indicating the trial court ever considered appointing separate counsel for the children. This was error.

III. The Trial Court's Failure to Consider Appointing Counsel for the Children Did Not Result in a Miscarriage of Justice

Mother appears to argue that failure to appoint counsel for a minor is reversible per se.[3] However, she does not argue that the prejudice requirement established in *Richard E.* is outdated and unsound. In any event, we are not free to reconsider the holding of *Richard E.* because as an inferior court, we obviously are bound by that opinion. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.)

Mother does not point to any factual circumstances specific to this case to suggest that failure to appoint counsel was prejudicial. Instead, she argues that "[b]ecause there was no evidence that there was no need for appointment—and in fact, the evidence

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[3] At oral argument, Mother's counsel essentially conceded that any error in the court's failure to appoint counsel for J.P. was harmless. However, she expressed concern that J.H. was in danger of becoming a "legal orphan" because the girl was experiencing severe adjustment issues and did not appear to be amenable to living with plaintiffs. After this appeal was filed, plaintiffs submitted a request for judicial notice of the trial court minutes dated April 19, 2016, which indicate that J.H. has become the subject of a dependency proceeding in which she has been given appointed counsel. The minutes also indicate that the lower court considered and rejected appointing counsel for J.P.

In re Zeth S. (2003) 31 Cal.4th 396, relied upon by Mother in opposing the request for judicial notice, held that except in a "rare and compelling case," postjudgment evidence may not be used on appeal as a basis to reopen and reverse a finding supporting the termination of parental rights. (*Id.* at pp. 399, 405, 413–414.) In *In re Zeth S.*, counsel sought to have the appellate court consider postjudgment information from counsel's unsworn statement in a letter brief that the parent was currently interacting with the child and that the relative caretaker had felt pressured by the social services agency to agree to adopt. (*Id.* at pp. 403–404, 407, 414, fn. 11.) However, since the court in *In re Zeth S.* imposed no absolute ban on postjudgment evidence (see Code Civ. Proc., § 909) and plaintiffs in the present case do not seek to reopen or reverse the termination order, we grant their request for judicial notice of the clerk's minute order—an objective document, the validity and accuracy of which is undisputed.

showed that appointment would have been appropriate—the error is not harmless." She stresses that counsel's input was needed here because the Department employee who prepared the investigative report never spoke to either child.[4] However, Mother does not identify any independent interests that her children might have, and she does not suggest plaintiffs have ever failed to provide for their welfare. We will not assume the children had unspecified interests that were not represented. (Cf. *In re Jenelle C.* (1987) 197 Cal.App.3d 813, 818–819 [where there was no suggestion that department of social services failed to take steps in furtherance of minor's welfare, trial court did not abuse discretion in failing to appoint independent counsel for minor].)

This is not a close case. It was undisputed that plaintiffs were providing a stable home for the children and that they were committed to adopting them. In contrast, Mother had been convicted in a total of 28 criminal cases, and had fought a long battle with addiction. Reportedly, she had not seen the children in person since 2006. Mother does not offer any substantive argument as to why the court below would not have been adequately advised of matters affecting her children's interests, and absent such an explanation we are unwilling to assume the court's decision was uninformed. (See *Adoption of Michael D.* (1989) 209 Cal.App.3d 122, 135 [where probation report and witness testimony agreed that minor wanted stepfather, not biological father, as his dad, failure to appoint counsel for minor was harmless].)

Moreover, the record contains no indication that either child had any interest in having the petition denied. J.H. did appear antagonistic to the petition, expressing a self-destructive desire to become emancipated so that she could live on the streets. Significantly, however, there is nothing in the record indicating that she had any desire to reunify with Mother. (See *In re Mario C.* (1990) 226 Cal.App.3d 599, 607–608 [where minors expressed no interest in living with their biological mother, there was no evidence they had an interest in having termination petition denied; failure to appoint independent counsel held harmless].) There was also no indication that J.P. was unhappy with his

[4] We discuss this point further below.

guardians' home and no indication of any expressed desire to ever live with Mother. For all of the above reasons, the trial court's error was harmless.

IV. Alleged Deficiencies in the Department's Report Do Not Mandate Reversal

Mother asserts the trial court's alleged failure to follow the requirements of section 7850 was reversible error, particularly in light of its failure to consider whether to appoint counsel for the children. This contention is subject to forfeiture since she did not object on this ground below. (See *In re Marriage of E. & Stephen P.* (2013) 213 Cal.App.4th 983, 992 [investigation and report under sections 7850 and 7851 are not jurisdictional and are therefore subject to forfeiture].) Regardless, her argument is puzzling, as it is clear from the record that the court did comply with this statute.

Section 7850 provides: "Upon the filing of a petition under Section 7841, the clerk of the court shall, in accordance with the direction of the court, immediately notify the juvenile probation officer, qualified court investigator, licensed clinical social worker, licensed marriage and family therapist, or the county department designated by the board of supervisors to administer the public social services program, who shall immediately investigate the circumstances of the child and the circumstances which are alleged to bring the child within any of the provisions of Chapter 2 (commencing with Section 7820)." At the hearing held on March 24, 2015, the trial court stated on the record: "I am going to refer it to the Probation Department. There needs to be a report. Statutorily, that requires a declare free report from the Probation Department." Subsequently, as noted above, the Department prepared a report and submitted it to the court. Accordingly, there was no error under section 7850.

As best we can discern, Mother is challenging the contents of the report itself, though she relies on the wrong statute. Section 7851, subdivision (b) provides: "The report shall include all of the following: [¶] (1) A statement that the person making the report explained to the child the nature of the proceeding to end parental custody and control. [¶] (2) A statement of the child's feelings and thoughts concerning the pending proceeding. [¶] (3) A statement of the child's attitude towards the child's parent or parents and particularly whether or not the child would prefer living with his or her

parent or parents. [¶] (4) A statement that the child was informed of the child's right to attend the hearing on the petition and the child's feelings concerning attending the hearing." As noted above, the children did not meet with the Department's investigator, thus the report does not contain any of the above elements. However, this failure is not necessarily error.

Section 7851, subdivision (c) provides: "If the age, or the physical, emotional, or other condition of the child precludes the child's meaningful response to the explanations, inquiries, and information required by subdivision (b), a description of the condition shall satisfy the requirement of that subdivision." The Department's report states that J.H. was emotionally unstable to the point where her therapist had advised against her meeting with the investigator. Additionally, plaintiffs reportedly elected not to bring J.P. to the meeting out of concern that he would experience backlash from his sister if she were to learn he had contributed to the process. While Mother contends "[t]here are a few problems with offering these reasons for failing to discuss the proceedings with [the children]," we find the asserted grounds to be sufficient.

Mother also notes that prior to adoption, the children will have to be notified about the process because section 8602 provides that a child over the age of 12 must give consent before that child can be adopted. She argues that this statute undermines any justification for forgoing meeting with the Department investigator. Actually, this point suggests any errors in the making of the report should be deemed harmless, as it appears the adoptions will not be finalized without direct input from both children.

V. The Trial Court's Failure to Follow Section 7891

Section 7891, subdivision (a) provides that "if the child who is the subject of the petition is 10 years of age or older, the child shall be heard by the court in chambers on at least the following matters: [¶] (1) The feelings and thoughts of the child concerning the custody proceeding about to take place. [¶] (2) The feelings and thoughts of the child about the child's parent or parents. [¶] (3) The child's preference as to custody . . . ." We are inclined to agree with Mother that the trial court committed error in not following the procedures set forth in this statute prior to terminating her parental rights.

Once again, however, she has failed to demonstrate that the error was prejudicial. She merely asserts that because the minors were not interviewed for the Department's report, and because the court failed to consider whether to appoint counsel for them, the error in failing to inquire about the children's preferences cannot be held harmless. We disagree. As *even she* acknowledges in her brief: "There is ample evidence in the record that [plaintiffs] provided a loving and nurturing home for [J.H. and J.P.] when [Mother] was unable to do so. [Plaintiffs] live close to the paternal relatives and were able to allow [the children] to remain in contact with their paternal relatives." Under these circumstances, to remand this matter and require the trial court to comply with the statutory requirements would be a needless waste of judicial resources. There is no actual dispute as to whether adoption is in the children's best interests. While we do not, of course, condone the trial court's failure to comply with statutory requirements, Mother simply does not offer any cognizable argument to suggest the final determination will be different if the court is compelled to undertake the required procedures.

For the foregoing reasons, we conclude that the trial court's failure to interview the children was harmless error.

DISPOSITION

The order granting plaintiffs' petition to free J.P. and J.H. from parental custody and control and terminating Mother's parental rights is affirmed.

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Dondero, J.

We concur:

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Humes, P. J.

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Margulies, J.